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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO HERNANDEZ,

Defendant and Appellant.

G055304

(Super. Ct. No. 14WF2909)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Scott Taylor and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Arturo Hernandez was convicted of multiple child sex crimes, including exhibiting pornography to a minor. Relying on Penal Code section 654, he contends the trial court should have stayed his sentence for that crime because he committed it solely to facilitate another crime, attempted oral copulation, for which he was punished. However, the record supports the court's conclusion appellant harbored multiple criminal objectives in carrying out those two offenses. Therefore, we uphold the court's sentencing decision and affirm the judgment.

FACTS

Appellant lived with Elizabeth R. and her family in Stanton. When Elizabeth was seven years old, appellant started sexually abusing her on a regular basis at their home. The abuse included lewd touching, sexual intercourse and attempted sodomy. Appellant also showed Elizabeth pornographic videos and tried to get her to orally copulate him on multiple occasions. At trial, Elizabeth testified the videos depicted men and women engaging in various sexual acts, including oral sex. Elizabeth could not remember how many times appellant showed her such videos. However, when the prosecutor inquired about the temporal relationship between the videos and appellant's oral copulation attempts, this is what she said:

“Q. And when [appellant] would try to have you lick his [penis], did he ever use those videos to show you what he meant?

“A. No.

“Q. So, that would happen at different times?

“A. Yeah.”

At trial, the jury also heard a recording on Elizabeth's pretrial interview with the Orange County Child Abuse Services Team (CAST). During the interview, Elizabeth said appellant showed her a video of a girl licking “his private part.” When asked if the girl in the video was licking appellant's private part, Elizabeth said no, she

was licking “a boy’s private part, and then he’s trying to do that to me, . . . [but] I’m all like no, and then I tried to run away.”

The jury convicted appellant of multiple sex crimes, including one count each of attempted oral copulation with a child age 10 or younger, and exhibiting pornography to a minor for purposes of engaging in sexual conduct. (Pen. Code, §§ 664, 288.7, subd. (b), 288.2, subd. (a)(2).)¹ The trial court sentenced appellant to multiple indeterminate life terms, plus a determinate term of 14 years in prison. The determinate term included consecutive sentences of 28 months on the attempted oral copulation count, and 8 months on the pornography count.

DISCUSSION

Appellant raises but one claim. He contends the multiple punishment prohibition contained in section 654 precluded imposition of sentence on the pornography count because it was part and parcel of the oral copulation count. We disagree.

Under section 654, a defendant cannot receive multiple punishment for a single act or omission, or an indivisible course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) Whether a course of conduct is divisible depends on the intent and objective of the defendant. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) “[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once.” (*Ibid.*) However, if the defendant’s crimes reflect multiple criminal objectives, he may be punished for more than one offense. (*People v. Beamon* (1973) 8 Cal.3d 625, 639; *People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Appellant contends the only reason he showed Elizabeth pornography was to get her to orally copulate him, and therefore the two crimes shared a single overarching

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All further statutory references are to the Penal Code.

purpose: To have Elizabeth give him oral sex. The argument is premised on the assumption the pornography count and the attempted oral copulation count occurred on the same occasion, but the evidence on that issue was not so clear. During her CAST interview, Elizabeth did indicate that appellant tried to get her to orally copulate him while he was showing her a video depicting that act. At trial, however, she testified the two events happened at different times, and appellant never used the videos as a teaching tool.

Faced with this conflicting evidence, we must remember, “‘The defendant’s intent and objective [for purposes of applying section 654] present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence. [Citation.]’” (*People v. Petronella* (2013) 218 Cal.App.4th 945, 964.) Under the substantial evidence test, “our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court’s decision. In that regard, we give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision.” (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, fns. omitted; accord, *People v. Petronella*, *supra*, 218 Cal.App.4th at p. 964.)

Resolving the conflicting evidence about the timing of appellant’s actions in favor of the trial court’s decision means we must presume the pornography count and the attempted oral copulation count occurred on separate occasions. That factual premise undermines appellant’s argument the crimes occurred hand in hand with but one intent. (See *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1289 [section 654 is no bar to multiple punishment when the subject offenses were committed on different days or were “‘temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one’”].)

Even if the counts occurred on the same occasion, it would not prove imposition of sentence on the pornography count violated section 654. The crime of exhibiting pornography to a minor has two separate intent requirements: 1) The intent to arouse the sexual desires of the minor or the defendant; and 2) the intent to engage in sexual conduct with the minor. (§ 288.2, subd. (a).) Thus, the trial court could reasonably find that, in showing Elizabeth pornography, appellant intended to both arouse her and gratify himself. The existence of these separate, albeit simultaneous, intents provided ample justification for the trial court's sentencing decision. (See *People v. Powell* (2011) 194 Cal.App.4th 1268, 1296 [in finding the defendant was properly punished for both exhibiting pornography to his victim and sexually abusing her, the court determined the intent to seduce another and the intent to gratify oneself are separate intents for purposes of section 654].)

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.